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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1796~~ 70-252

INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

VERSUS

METROPOLITAN PAVING COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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July, 1971

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Respondents concur with the remarks of the Petition under the titles "Opinion Below," "Jurisdiction," "Statute Involved" and that portion of paragraph 1 of "Statement of Case" which quotes from the opinion of the Court of Appeals. We suggest initially that the evidence reflects a conflict between two labor unions over craft jurisdiction, and we do not, therefore, agree with footnotes 1 and 2 of Petitioner's brief which seem to indicate that the Laborers Union was a "neutral" in the controversy. The evidence reflects that when the Barbour-Greene machines began operation no "oiler" (member of Operating Engineers) was ever assigned to the machine by management, although an "oiler" did perform such services for a short period until

such was discovered by the employer. He was then removed by management[1] and replaced by a member of the Laborers Union, who performed all the normal duties of an "oiler" except the actual oiling of the machine, the latter function being handled by a single roving "oiler" (a member of the Operating Engineers) who was assigned this duty with respect to several types of equipment including the Barbour-Greene. Nor is the extracted testimony of the witness Jeznach fairly representative of the extensive testimony revealing the conflict between the Operating Engineers and Common Laborers as to who should assist the operator of the Barbour-Greene machines.[2] Since this is not a brief on the merits we do not consider it appropriate to herein minutely detail that evidence, but do submit that our statement, above, concerning the jurisdictional conflict is substantiated by the testimony of a variety of witnesses

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1. Mr. Benn [of the Laborers Union] R. III-470-475; Mr. Paine [of the Operating Engineers] R. II-275; Mr. Garbesi [M-G-T] R. III-446; Mr. Wilson [of the Operating Engineers] R. II-267; Mr. Bogan [of the Operating Engineers] R. II-233-235.

2 Mr. Jeznach was the Chief Executive Officer (Business Manager) of the Colorado Laborers Council, and was an eager, voluntary witness for the Operating Engineers. His testimony typified the situation referred to by the Ninth Circuit panel in *International Brotherhood of Carpenters* v. *C. J. Montag & Sons, Inc.*, 335 F.2d 216 (9th Cir., 1964); *cert. den.*, 379 U.S. 999, 85 S.Ct. 719:

> "All responsible union officials are aware that jurisdictional disputes and featherbedding are in bad repute, and they try to avoid putting friendly allied unions in the position of engaging in these tactics." *Id.*, 335 F.2d 220.

Despite that, however, it is noteworthy here that other officers of the Laborers Union (Cordova, R. II-301, 302) and Nelson (R. III-308, 311) each of whom was more intimately concerned with the situation, testified not only that the Laborers did *not* disclaim the work, but instead accepted the assignment from M-G-T under the assertion that where an oiler was not required on a particular machine it was "historically" the work of the Laborers Union (R. II-301, 302).

representing all parties concerned. Mr. Tye [M-G-T] R. II-167-177, 181-190; Mr. Garbesi [M-G-T] R. II-443, 446, 464; Mr. Paine [Operating Engineers] R. II-275-277, 279-281, 285, 288; Mr. Nelson [Laborers' Business Agent] R. II-308, 311; Mr. Cardova [Laborers] R. II-301-302, 305, 306; Mr. Wilson [Operating Engineers] R. II-267-271; Mr. Lenhart [Operating Engineers] R. III-533. The witness Benn [Laborers Union] had actually been performing the work for the two-week period immediately preceding the strike (R. III-469-500), during which time an officer of the Laborers Union was meeting and trying to harmonize the "conflict of the Labor Union craft jurisdiction" with an officer (steward) of the Operating Engineers (R. III-500). The management of M-G-T was, in effect, a "neutral" as exemplified by the testimony of Mr. Tye [M-G-T] who in reply to a question raised by the court as to whether or not it made any difference to M-G-T if the "oiler" was a member of the Laborers Union or the Operating Engineers Union stated: "No, it wouldn't make any great difference to me" (R. II-183). However, Mr. Tye also testified that management's primary concern was "avoiding a jurisdictional squabble between the Laborers and the Operating Engineers, because the Laborers had claimed the work" (R. II-182). Mr. Nelson [Laborers] testified in response to the question asking if historically, where an oiler was not assigned on a Barbour-Greene machine, it was not standard procedure for the men of his union to do it, stated: "I would say the Laborers (do it) normally if an oiler is not present * * * that is habitually so that our people do this work" (R. II-309). Mr. Gill [M-G-T] testified, in cross-examination, when asked why he did not assign an "oiler" to the Barbour-Greene machine and then figure out who

was right or wrong, replied: "You are suggesting that I take away the work from the Laborers and give it to the oilers and subject myself to a possibility of another strike, when I have a legal, binding, valid contract participated in by your International Union to not shut down my job, and you want me to do something else to get a strike? That would be a ridiculous way to run a construction job" (R. V-798-799). Mr. Lenhart [Operating Engineers] in response to a question asking if he and two other Operating Engineer officials marched into the office of Mr. Garbesi [M-G-T] and demanded that an oiler be assigned to the Barbour-Greene machine or there would be plenty of trouble on the project, stated: "That is about right. The three of us did go to his office * * * I was the person who told him that unless he changed his mind in all probability there would be a shutdown" (R. III-533).

Concerning this subject the Tenth Circuit observed in its opinion (App. A. to Pet., p. 4a):

> "There is a wide difference between the parties as to whether there was a jurisdictional dispute. The record however demonstrates that an employee of a union other than the Engineers Union was performing the duties as a helper to the operator of the trencher at the time the strike began and when the Engineers took the strike route to force the assignment of a member of their union to the position. The record also shows informal meetings between members of the Laborers Union and the Engineers Union over the position of the helper. In brief there was sufficient evidence to support the determination made by the jury on this issue. The record further shows that the instructions given by the trial court on this issue are accurate statements of the law."

One of those instructions was, in part: "A jurisdictional dispute concerns separate crafts of workers *and a dispute solely between an employer and union is not a jurisdictional dispute.*" (Emphasis supplied.) (R. I-91-92). This language was much more favorable to the Union than would appear to be required by *International Longshoremen, et al.* v. *Juneau Spirits Corp.*, 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275. And see *Local 978 National Brothers of Carpenters and Joiners* v. *Markwell* (8th Cir., 1962), 305 F.2d 38; *N.L.R.B.* v. *Local 25 International Brothers of Electrical Workers* (2nd Cir., 1967), 383 F.2d 449.

I

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

The Petitioner represents that the sole question presented is whether a "dispute between two or more groups of employees over which is entitled to do certain work for an employer" is an essential element of the unfair labor practice defined by Section 8(b)(4)(D) of the Taft-Hartley Act (Pet., p. 2). It asserts that the decision below involving this question is contrary to the holding of this Court in *CBS*.[3] The decision in *CBS* involved solely the question of the extent of the responsibility imposed on the National Labor Relations Board by Section 10(k)[4] of the National Labor Relations Act, this Court holding that the Board was required thereunder to decide jurisdictional disputes presented to it on their *merits* instead of in the lesser manner

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[3] *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union* (CBS). 364 U.S. 573.

[4] 29 U.S.C. Section 160(k), 29 U.S.C.A. Section 160(k).

followed by the Board in the dispute involved in that particular case. This Court's reference to a jurisdictional dispute as comprehended by Section 8(b)(4)(D)[5] of the Act as being a dispute between two or more groups of employees over which is entitled to do certain work for an employer appears to be ancillary to the decisionary holding that under Section 10(k) the Board is required to terminate that dispute by rendering a decision that one or the other is entitled to the work.[6] In the case at bar there is no issue concerning either the authority or the duty of the Board in a 10(k) hearing—or anything else involving such administrative procedure.

Neither is there justification for the suggestion by Petitioner that this case should be set down for argument with Nos. 1184 and 1231, October Term, 1970 (*N.L.R.B.* v. *Plasterers Local Union No. 79; Texas State Tile and Terrazzo Co., et al.* v. *Plasterers Local Union No. 79*).[7] In that case it appears from the opinion of the Court of Appeals, District of Columbia Circuit, that the sole issue is "whether it was error for the Board [N.L.R.B.] to have conducted a 10(k) hearing after being timely advised that both unions had agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes * * *." Again, no such question is involved in the instant action.

The brief of Petitioner is presented on its basic argument that the strike did not come within the proscription

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[5] 29 U.S.C. Section 158(b)(4)(D).

[6] 364 U.S. at 578.

[7] 74 LRRM 2575, 440 F.2d 174 (1970).

of Section 8(b)(4)(D) because the Laborers Union was not "claiming" the work, apparently through some written or otherwise formal demand made upon the employer. The statute, of course, makes no such requirement. The statute *only* requires an employer to prove that the union induced or encouraged an employee to engage in a strike or work stoppage where *an* object thereof was to require "any employer to assign paricular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . ." 29 U.S.C. §158. We believe it clear that the language of the statute itself does not require proof of a "claim." However, in its attempt to engraft the requirement of a "claim" to an employer's burden of proof, the union not only overlooks the language of the statute, but also overlooks the undisputed evidence that a member of the Laborers Union was actually performing the questioned work and being paid for it. (The obvious query as to what would prompt a union leader to formally "claim" work which his men were already performing, and being paid for, is likewise unanswered.) If "laying a claim" to work is considered to be a necessary part of the employer's burden of proof, the language of the statute notwithstanding, we respectfully submit that the work was sufficiently "claimed" by the Laborers Union when the work assignment was accepted and performed by that union. It is undoubtedly true that Section 8(b)(4)(D) was, as the Union argues, "aimed at protecting 'the employer trapped between the * * * claims' of rival unions." *N.L.R.B.* v. *Local 825, International Union of Operating Engineers*, — U.S. —, 91 S.Ct. 402, 408 (1971). However, this Congressional aim does not mean that the Act is *limited* to situations involving a Hatfield-McCoy "shooting war" between two ri-

val unions over a job. Particularly is this true where, as in the case at bar, one labor organization already has the work in question.

The Union suggests that the Act is inapplicable to "manning" disputes, apparently because they are not sufficiently intense enough conflicts to fall within the Congressional aim. We respectfully suggest that the fallaciousness of this argument is nowhere more aptly demonstrated than in this Court's recent holding in the above cited *N.L.R.B.* v. *Local 825, International Union of Operating Engineers* case. That case grew out of a run of the mill "manning" dispute in which the Operating Engineers Union contended that the job of pushing the buttons to start and stop an electric welding machine belonged to them rather than members of the Ironworkers Union who were assigned by the employer to perform that task as well as the actual welding. Just as in the instant case, the Operating Engineers, upon learning of the work assignment, threatened the employer with a strike unless he immediately reassigned the work to the operators; just as in the instant case, the employer refused, and the Operating Engineers struck. Both Section 8(b)(4)(D) and Section 8(b)(4)(B) were involved in that case. However, when presented with the above fact situation, which virtually parallels the facts in the instant case, there was unanimity in the opinions of both the majority and dissenting minority of this Court on one point: "The practices here were unfair under *both* sections * * *." *Id.*, 91 S.Ct. 408. (Emphasis supplied.) The dissent in that opinion was even more specific in labelling the Operating Engineers conduct as an illegal jurisdictional strike within the purview of Section 8(b)(4)(D):

> "The aim was not to freeze out White [i.e., the employer] or to close him down for an hour or for the duration. It was merely to get the work, whose assignment he controlled, for members of Local 825. The case is therefore the classical jurisdictional conflict covered by Section 8(b)(4)(D) which makes 'forcing or requiring any employer to assign particular work to employees in a particular labor organization' an unfair labor practice.
>
> "The Board properly issued a cease and desist order concerning the jurisdictional dispute condemned by Section 8(b)(4)(D)." *Id.*, 91 S.Ct. 409.

In the above quoted opinion this Court was reviewing an opinion from the Third Circuit in which the Operating Engineers contended, as they do here, that there was no "*claim* by the Ironworkers to the work in question as would create a jurisdictional dispute." The Third Circuit's holding on that particular point (which appears to have been approved by this Court's language as quoted above) is as follows:

> "The contention that there were no conflicting claims creating a jurisdictional dispute is without merit. The employer's original assignment of Ironworkers to start and stop the electric welding machines they were to use may well have been made routinely without demand by those employees or their union. However, they did accept this work as an incident of their job. This entire dispute grows out of that work assignment and its acceptance."

An excellent discussion of a jurisdictional strike, also based upon facts similar to the case at bar is found in *International Brotherhood of Carpenters* v. *C. J. Montag & Sons,*

Inc., 335 F.2d 216 (9th Cir., 1964), *cert. den.* 379 U.S. 999, 85 S.Ct. 719 (1965), where the Court held:

> "The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes." *Id.*, 335 F.2d 221.

As the holdings in the above cases demonstrate, the Union's contention that the "laborers never claimed" the oilers' work is not relevant to the legal issues herein involved. The Third Circuit panel was even more specific on this point in *N.L.R.B.* v. *Local 1291, International Longshoremen's Association*, 368 F.2d 107 (3rd Cir., 1966):

> "While this case was pending, N.M.U. [i.e., National Maritime Union] advised . . . that it 'does not make claims to the work of opening and closing hatches involved in the case' . . . however, there was no refusal of N.M.U. seamen to do this work . . .
>
> "The respondent argues that the 'disclaimer' by N.M.U. prevents this case from presenting a jurisdictional dispute . . .
>
> * * * * * *
>
> "When, as in this case, one group insists that work, for which another group has contracted and is being paid, be assigned it, the fact that both groups are claiming pay for the same work suffices to create a

> jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work." *Id.*, 368 F.2d 110.

We respectfully submit that the above quoted cases correctly interpret the scope of a jurisdictional dispute, and adequately dispose of the Union's contention that such a dispute could not exist because the Laborers Union was not "claiming" the work which it, in fact, was already performing. Beyond that, the evidence amply sustains the existence of the dispute between the rival unions, as heretofore set out. Under the evidence in this case it is unrealistic of the Union to assert non-liability on the basis of no "claim" to the work by the Laborers Union.

The heavy reliance by Petitioner on a 1961 District Court case, *Penello* v. *Local Union No. 59 Sheet Metal Workers,* 195 F.Supp. 458 (D.C. Del., 1961), is misplaced.[8] The essence of the dispute in *Penello* was whether the sheet metal workers would be given travel pay—and did not *remotely* involve a work assignment. For this reason the Court held that the issue before it was *"not a dispute between rival groups of employees but solely a dispute between duPont and respondent."* (Emphasis by the Court)

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[8] Initially, it should be noted that the case has now been distinguished on its facts by no less than four Circuits (2nd, 3rd, 5th and 9th): *Construction Employers' Association of Texas et al.* v. *International Union of Operating Engineers, Local 450, AFL-CIO* (5th Cir., 1970), 427 F.2d 230, at 234, *cert. den.,* 400 U.S. 926, 91 S.Ct. 186, *reh. den.* — U.S. —; *N.L.R.B.* v. *Local 25, International Bro. of Electrical Workers* (2nd Cir., 1967), 383 F.2d 449, at 454; *International Bro. of Carpenters* v. *C. J. Montag & Sons, Inc.* (9th Cir., 1964), 335 F.2d 216, at 219, *cert. den.* 379 U.S. 999; *Cuneo on behalf of N.L.R.B.* v. *Local No. 825, International Union of Operating Engineers, et al.* (3rd Cir., 1962), 300 F.2d 832, at 836.

Despite the Union's denial of the existence of a jurisdictional dispute in the four cases cited in footnote 8, the Courts found that their conduct in each instance brought them within the proscription of Section 8(b)(4)(D). The general facts which led the Petitioner to strike in the instant case are remarkably similar to the general pattern of activity engaged in by the Operating Engineers as revealed in a series of recently reported cases. In each of those cases the Petitioner has presented some variation of its contention that no jurisdictional dispute existed because no rival union was "claiming" the work involved. See *Construction Emp. Ass'n of Texas* v. *International Union of Operating Engineers,* 427 F.2d 230 (5th Cir., 1970), *cert. den.* 400 U.S. 926, 91 S.Ct. 186, *reh. den.* — U.S. —, in which the Fifth Circuit Panel referred to a similar argument by the Operating Engineers as "semantic sophistry." *Id.*, 427 F.2d 233. Also see *Cuneo* v. *Local No. 825, International Union of Operating Engineers,* 306 F.2d 394 (3rd Cir., 1962); and *N.L.R.B.* v. *Local No. 825, International Union of Operating Engineers, AFL-CIO,* 410 F.2d 5 (3rd Cir., 1969), *rev.* (on other grounds) 400 U.S. 297, 91 S.Ct. 402, 27 L.Ed. 398.

On page 14 of the Union's brief, in its suggestion that the Act does not apply to "manning" questions, it is argued that:

> "[t]he sole object pursued in Section 8(b)(4)(D) was to perfect the bargaining process as it relates to work assignment disputes. This was done by providing a statutory solution for a problem that collective bargaining cannot solve—the alleviation of the situation of an employer caught 'between the devil and the deep blue' (*CBS*, 364 U.S. at 575)."

Congress did provide a "statutory solution," which was to make all strikes illegal which were engaged in for the object of "forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than the employees in another labor organization. . . ." It is doubtless true that the "essence" of a jurisdictional strike is competing claims for work—but the Congressional solution, in effect, quite validly presumes that the evil of "competing claims" for the same work is presented to the employer *each* time a strike for such a precluded object occurs.

CONCLUSION

The record overwhelmingly supports the conclusion that an object of the strike was to force an employer to assign particular work to one group of employees rather than to another group. That is sufficient to show a violation of Section 8(b)(4)(D); to require more would emasculate the effectiveness of that Section of the Act. We agree with the court below that there was "sufficient evidence to support the determination made by the jury" on the issue of a jurisdictional dispute (Pet., App. A, p. 4a). For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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